Commonwealth of Massachusetts
Supreme Judicial Court

No. SJC-13386

CHRIS GRAHAM, JORGE LOPEZ, MEREDITH RYAN, KELLY AUER,
COMMITTEE FOR PUBLIC COUNSEL SERVICES, AND
HAMPDEN COUNTY LAWYERS FOR JUSTICE,
Petitioners-Appellants

v.

DISTRICT ATTORNEY OF HAMPDEN COUNTY,
Respondent-Appellee

BRIEF FOR RESPONDENT-APPELLEE

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

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Dated: June 20, 2023

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STATEMENT OF FACTS AND ISSUES

The Respondent, Hampden County District Attorney's Office ("HCDAO") accepts the facts and issues as set forth in the Report of Special Master dated October 18, 2022. R3 640-715.

SUMMARY OF ARGUMENT

This Petition is based on a faulty factual premise: that there is a systemic injustice in Hampden County that can only be remedied with extraordinary relief. Despite wide latitude, and resort to such sources as news articles and unsubstantiated complaints, Petitioners have failed to prove that premise. (2-24)

The record compiled by the Special Master shows that the normal trial and appellate process is functioning properly in Hampden County, and is adequate to redress any grievances Petitioners may identify. (24-31)

The "remedies" sought by Petitioners are not directed at correcting any prejudice to defendants, but rather at achieving Petitioners' goal of expanding prosecutors' Brady obligations and rewriting Rule 14, outside the normal rule-making or appellate processes, and without the input or participation of the many stakeholders who might oppose their positions. (31-44)

ARGUMENT

THE RHETORIC:

"The criminal legal system in Hampden County is in crisis."

-- Opening Sentence of Corrected Petition for Relief Pursuant to G.L. c.211 §3 and G.L. c.231A §1, May 28, 2021, Record Appendix 1 031

THE RECORD:

"The Corrected Petition alleges that the DAO 'has routinely failed to disclose Brady evidence related to police misconduct.' The facts do not support this allegation."

-- Report of Special Master, October 18, 2022, Record Appendix 3 706.

The time has come to focus on the record rather than the rhetoric. Two years of legal skirmishes, four days of testimony, eleven witnesses, thousands of pages of exhibits, and a seventy-six-page report from the Special Master (R3 646) have established that the Corrected Petition suffers from a fatal flaw: its factual premise is false. Constructed on shifting sands of accusation, speculation, and innuendo, Petitioners' rhetoric makes excellent press releases and tasty clickbait. See ACLU, Public Defenders, and Defense Lawyers Call for Investigation into Years of Springfield Police Misconduct, Hampden DA Complicity | American Civil Liber-

ties Union, April 6, 2021, last accessed May 31, 2023. But mere rhetoric, no matter how dramatic and passionate, cannot justify the unprecedented departure from fundamental legal principles Petitioners seek from the Court in this case.

As the Special Master found, Petitioners failed to prove the essential facts they claim entitle them to relief. Yet even had they succeeded in their ambitious effort to establish the existence of a heretofore unrecognized "crisis" in Hampden County, their Petition would fail. Petitioners' goal is not the redress of harm to any identifiable defendant or group of defendants. Rather they seek to circumvent the normal trial and appellate process, to effect the wholesale dismissal of thousands of cases, and to rewrite the law to conform with their political view. The extraordinary relief sought in this petition brought pursuant to G.L. c.211§3 and G.L. c.231A §1 would, indeed, be extraordinary—not simply because it would require an utter disregard for a foundational principle that cases should be decided on their individual facts, but because it seeks "remedies" for misconduct that exists nowhere but in Petitioners' imagination, and of such magnitude as has never before been granted.

The exculpatory "evidence" Petitioners allege—but have failed to prove—was withheld by the HCDAO would not furnish a substantive element of any

crime. Rather, Petitioners claim that Hampden County defendants have been deprived of descriptions of excessive force[1] and untruthfulness by Springfield police officers in unrelated cases long since resolved—facts that, if established, might at best be offered for impeachment. Left wholly unaddressed is the inconvenient truth that, under current Massachusetts law, there is but the narrowest window for such evidence to be admitted. See Section 608, A Witness's Character for Truthfulness or Untruthfulness, Mass. G. Evid.; Section 404, Crimes or Other Acts, Mass. G. Evid.; *Matter of a Grand Jury Investigation*, 485 Mass. 641, 651-653 (2020). See also, *Commonwealth v. Samia,* 2023 WL 3743391 (June 1, 2023), citing *Commonwealth v. Bart B.,* 424 Mass. 911, 916 (1997) (failure to impeach a witness does not generally prejudice the defendant or constitute ineffective assistance).[2]

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[1] It is unclear that excessive force by a police officer, standing alone and without concomitant untruthfulness, is exculpatory in unrelated cases. See *Matter of a Grand Jury Investigation,* 485 Mass. 641, 653 (2020) (requiring disclosure where the prosecutor determines that "a potential police witness *lied* to conceal a fellow officer's unlawful use of excessive force or *lied* about a defendant's conduct and thereby allowed a false or inflated criminal charge to be prosecuted" [emphasis added]. Nevertheless, Petitioners have assumed such evidence to be exculpatory, and in the HCDAO's view, nothing turns on the point, which is perhaps better left for another day. For purposes of this petition, the HCDAO will embrace this Court's instruction that prosecutors should "err on the side of caution," id. at 650, and assume that even truthful accounts of excessive force are potentially exculpatory in unrelated cases.

[2] The examples cited by Petitioners to the contrary involve direct inconsistencies in a witness's testimony about the facts of the case on trial, a circumstance not relevant here. See Petitioners' Brief at 34.

Despite the lengthy and far-reaching proceedings in this case, Petitioners have failed to identify a single criminal defendant whose rights have been affected by the alleged misconduct that forms the basis of their criminal justice reform "wish list."[3] The record shows that, in not one of the thousands of pending and closed cases Petitioners claim were tainted by police misconduct, has any defendant even attempted to use the information that Petitioners claim was withheld by the HCDAO. No defendant has offered evidence of such misconduct at trial, or attempted to obtain the evidence in admissible form, or sought additional discovery about this supposedly exculpatory evidence.[4] No defendant has sought a new trial, or to vacate a conviction, or to withdraw a plea on the grounds of undisclosed police misconduct. No defendant has sought sanctions against the HCDAO for what Petitioners claim is a consistent pattern of *Brady* violations. R3 383; R3 678.

Instead, Petitioners and the defense counsel of Hampden County have simply sat idly by while the HCDAO spent more than a year, committed personnel

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[3] Petitioners continue to tout the injustice allegedly done to Chris Graham, ignoring the record evidence that his conviction—if wrongful—was due to the "inexcusable" conduct of his defense counsel, a member of petitioner Hampden County Lawyers for Justice. Memorandum and Order, R6 255-256; Report of Special Master, R3 653. See discussion at 9, infra.

[4] None of the extensive proceedings in this case has addressed the practical implications of the long and potentially impassable road from a defendant's belief that a (possibly unattributed) statement in a police report is untruthful, to the process of obtaining evidence of untruthfulness in admissible form, and then on to the evidentiary obstacles to admissibility posed by Mass. G. Evid. Sections 403 and 608.

and hundreds of hours of making disclosures in some 8000 cases—most long since closed. Throughout that process, Petitioners have taken neither steps to investigate or disseminate the information they have received—not even among themselves or within their own organizations, nor offered assistance or support to the HCDAO in its efforts to pry further details from the Department of Justice ("DOJ"). Indeed, Petitioners have segued back and forth between claiming, on the one hand, that the misconduct at issue is the subject of the DOJ report, and on the other, alleging a much larger pattern of allegedly wrongful conduct and even "complicity" by the HCDAO—including that the District Attorney has entered *nolle prosequis* to avoid disclosing police misconduct. See, e.g., R1 032, 034, 043. Suffice it to say that no court has agreed with them.

Many of Petitioners' sweeping and often vague accusations of HCDAO misconduct suffer from the "have you stopped beating your wife yet?" fallacy. While filling many pages of the record with documents and details about the HCDAO's handling of cases such as "the Palmer incident" and the "Nathan Bills" incident, among many others (Petitioners' Brief at 16-20), Petitioners simply assume that these materials were subject to some duty of disclosure, without ever identifying a supporting legal theory, the facts allegedly withheld, or the defendants who were allegedly wronged. Regardless of the current basis for Petitioners' claim, these proceedings have created a record that firmly and effectively disproves their various

allegations. The Report of the Special Master concisely and effectively summarizes the infirmities in Petitioners' proof.

I. Petitioners Have Failed to Prove the Factual Premise of their Petition, and Thus Are Not Entitled to Relief in Any Form.

A. The HCDAO is Aware of and Attentive to Its Disclosure Obligations

The threshold factual question raised by the Petition is whether Petitioners have made such a showing of pervasive misconduct or systemic deprivation of defendants' constitutional rights that this Court ought to depart from the time-honored practice of adjudicating individual cases and instead fashion a global remedy to redress their perceived grievances. The Special Master has clearly and definitively answered that question in the negative. Undaunted, the Petitioners ignore the Special Master's conclusions, disagree with her findings,[5] and persist in attempting to impose their view of appropriate criminal justice reform, despite the lack of factual predicate or legal justification.

The HCDAO's eighty assistant district attorneys file an average of more than 18,000 cases per year—a total of 131,789 over the seven years of District Attorney Anthony Gulluni's tenure. R3 655. The Record Appendix submitted with

[5] See e.g., Petitioners' Brief at 40-47, where they argue that the HCDAO has withheld evidence, and at 27, fn. 11, where they claim the HCDAO had prior knowledge of the Kent Report. Despite a virtually unlimited opportunity to present these claims to this Court and the Special Master, Petitioners failed to prove them.

the original Petition contained seventeen affidavits from defense lawyers, mostly affiliated with one of the organizational Petitioners, that identified a mere sixteen cases in support of their claims that the HCDAO is engaged in systemic misconduct. The Special Master did not find that the HCDAO failed to disclose exculpatory evidence or otherwise acted improperly in any of the sixteen cases, with the possible exception of *Graham*, discussed infra at 9.

Indulging Petitioners' preference for rhetoric and innuendo over fact, four of the seventeen affidavits (Raring, Rogers, HCLJ president Hoose, and CPCS supervising attorney Madden, see Corrected Record Appendix, Docket No. 24, 5/20/2021, at 00070-00071, 00543-00543; R6 5-8, R6 74-76) failed to identify a single problematic case, relying instead on broad, unsupported generalizations criticizing the HCDAO. Meredith Ryan and Kelly Auer, the two individual attorneys named as petitioners, offered almost identical non-specific claims:

> In my experience, the HCDAO has displayed a pattern of failing to identify, investigate, collect and disclose material exculpatory and impeachment evidence known to members of the prosecution team, including to Springfield Police Department ("SPD") officers involved in the prosecution as investigating and/or arresting officers.

R6 081 ¶2 (Auer).

> In my experience, the HCDAO consistently fails to identify, investigate, collect and disclose exculpatory material and impeachment evidence known to members of the prosecution team, including to Springfield Police Department officers.

R6 077 ¶6 (Ryan). See also O'Connor affidavit, R5 326 ¶3. In this brief, Respondent has followed the Special Master's practice of ignoring these unsupported opinions. R3 642.

The original list of sixteen cases morphed over the next year and a half into two lists totaling thirty-one identified cases, on which *only two* of the original sixteen cases remained. R1 642-648, 649-656. Petitioners' final lists of allegedly problematic cases, filed on August 5, 2022, contained fourteen cases which were identified for the very first time, unaccompanied by any supporting documentation, and some bearing only a citation to a news article. In two interim filings, several other cases made cameo appearances. R1 405-499, 566-641.

Chris Graham. The case involving the lead petitioner, Chris Graham, arose out of an altercation outside a Springfield bar between Graham and two off-duty officers, neither of whom was a member of the SPD Narcotics Unit. R3 647. The pertinent facts are well-summarized by the Special Master. R3 647-653.

The essence of Petitioners' claims is that the "Call Number" on the SPD arrest report (R6 137) should have caused the assistant district attorney to understand that a recorded 911 call existed, and therefore to obtain and disclose it. R2 470-481. The Special Master rejected this claim. R3 650. Indeed, the evidence showed

that neither Graham's trial counsel[6] nor his appellate counsel,[7] both of whom had the same arrest report, reached the conclusion Petitioners claim the prosecutor should have formed. Id. The Special Master did find that, from the circumstances of the incident, both counsel "had reason to suspect the likelihood of a 911 call, such that both of them [prosecutor and defense trial counsel] should have inquired." R3 650.

The selection of Graham as the lead Petitioner here is truly baffling, and speaks volumes about the merits of this Petition. One would expect that a "crisis" would be exemplified by something more compelling than a case in which defense counsel's representation was "inexcusable" and the prosecutor labored under the same mistaken belief as Graham's two defense counsel. At best, the Graham case demonstrates a single instance, having nothing to do with police misconduct, where a prosecutor and two defense counsel all made the same error, presumably in good faith.

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[6] In addition to having the arrest report, Graham's trial counsel, Tracy Duncan, was present when her client told the SPD IIU that a bystander had made a 911 call, a fact confirmed in an IIU report that was not known or disclosed to the HCDAO. Despite Duncan's actual knowledge that a call existed, she failed to request it. R2 396, 407; R6 183.

[7] The affidavit from appellate counsel, Mary Sita Miles, shows that she first obtained the IIU report, which described a 911 call, and only then asked the HCDAO to obtain call recordings—which it promptly did. R3 652; R6 115.

Jorge Lopez. The second Hampden County defendant Petitioners enlisted to represent their cause was Jorge Lopez, who had two separate pending cases that were the subject of extensive litigation in the Superior Court. As with Graham, the Special Master's report accurately summarizes the proceedings. R3 654-655.

The choice of Lopez is perhaps even more perplexing than the selection of Graham. Lopez's counsel, Katherine Murdock, submitted a lengthy affidavit with voluminous attachments. R7 21-65; see also R7 66-192. However, when Murdock was asked at the hearing before the Special Master what she claimed the HCDAO did wrong, she offered only the following vague observation:

> His case pended for three and a half years. He was incarcerated for the entire duration of the case. The Hampden County's District Attorney's Office opposed many motions at many turns and didn't, in my belief, didn't exhaust all of the available routes for them for getting information.
>
> So to my point of view—and this is my personal opinion—I think that it could have been handled in a different way.

R3 126-127.

The Lopez pleadings show a protracted discovery dispute in which Lopez's counsel attempted to obtain from the HCDAO materials that would normally be covered by this Court's holding in *Commonwealth v. Wanis*, 426 Mass. 639 (1997) and *Commonwealth v. Rodriguez*, 426 Mass. 647 (1997). The Commonwealth sought clarification of Judge McDonough's order, including in a single justice peti-

tion, because that order departed from well-established law by requiring the Commonwealth to make "inquiry" of the IIU regarding records not in its possession. Uncomfortable with the informal inquiry contemplated by that order, the Commonwealth proactively filed a Rule 17 motion—a responsibility *Wanis* and *Rodriguez* assign to the defendant. At that point, the Commonwealth's role became largely that of a bystander to a battle between the Murdock and the City of Springfield, including over access to the "Kent Report."

Perhaps most perplexing about Petitioners' selection of Lopez as a lead plaintiff is that the docket sheets and pleadings from his two cases reflect a system that is working precisely as intended. Lopez involved an extensive discovery process—in large part due to actions taken by the Springfield City Solicitor—in which the parties advocated their positions before a Superior Court judge. The trial court made various rulings, and Lopez's counsel eventually received more than a thousand pages of documents—after which Lopez promptly pleaded guilty. R3 654. The Lopez case demonstrates beyond doubt the absence of a need for extraordinary relief from this Court.

The "Bigda" Incident. On February 26, 2016, SPD Detective Gregg Bigda was captured on videotape making verbal threats to three juveniles that included

statements that he could falsify evidence.[8] As part of routine discovery, the HCDAO produced these videos to defense counsel for the three juveniles, who apparently never looked at them. They were first viewed by an assistant district attorney who was preparing for trial. The result was widespread disclosure of the videos, first in individual cases, and then in the public media. R3 363-368; R3 657-658; R5 118-119.

The fallout was extensive and public. The federal government investigated the incident, and Bigda began to refuse to testify in pending Hampden County criminal prosecutions. As a result of his unavailability, the HCDAO was forced to dismiss a number of drug prosecutions. R3 363-368. Many of these dismissals were reported in the media, which followed the story closely. R1 653-654, Case Nos. 12, 13, 14, 15, 16, 17. Whatever the Bigda misconduct may have been, it was not undisclosed.

No court ever found that the HCDAO violated any disclosure obligation, in connection with the Bigda video, nor have Petitioners identified either a fact that was not disclosed or a disclosure rule that was violated. The suggestion seems to be that the HCDAO should have disclosed in unrelated cases a supplemental arrest

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[8] Contrary to Petitioners' claims (Petitioners' Brief at 42), First Assistant Fitzgerald sent the Wilbraham police report to then SPD Commissioner Barbieri on March 22, 2016 for investigation. R3 751. Neither the SPD nor anyone else (including the alleged victims or the United States Attorney's Office) could identify the perpetrator with sufficient certainty to sustain criminal charges.

report from a Palmer officer who reported that an identified SPD officer kicked one of the juveniles. The federal government later indicted two officers as the alleged perpetrators; the indictment of Stephen Vigneault was dismissed, and Bigda was acquitted. R3 334. Petitioners do not cite a rule requiring disclosure under these circumstances, nor do they articulate a test for determining whether, when, or to whom an unproven allegation of misconduct by an unidentified officer should be disclosed.

Nathan Bills: The proverbial barrels of ink have been spilled in discussion of the Nathan Bills incident, a bar fight involving off-duty SPD officers that occurred in April 2015. Like the Bigda incident, no court ever found that the HCDAO violated any disclosure obligation, nor have Petitioners identified either a fact that was not disclosed or a disclosure rule that was violated.

The incident received widespread publicity in the Springfield community. The SPD investigated, and the HCDAO reviewed the available information to make charging decisions. When the HCDAO determined that the information was insufficient to bring charges, it nevertheless posted its report on its website because of the public interest in the case.[9] R3 660.

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[9] As with the "Palmer" report, Petitioners take the position that an unsubstantiated allegation of misconduct by an officer who cannot be identified is exculpatory. It takes little imagination to envision Petitioners' counsel, the ACLU, on the other side of this argument, complaining that a disclosure made about an officer who

The federal government likewise declined to bring charges, and the Attorney General, after obtaining additional surveillance video, indicted fourteen officers on a variety of charges. It is undisputed that the Attorney General provided no information about its investigation to the HCDAO, other than fourteen letters that notified the District Attorney of the indictments, which the HCDAO in turn distributed to defense counsel in cases where the indicted officers were potential witnesses. Specifically, the Attorney General never transmitted grand jury minutes or other investigative materials to the HCDAO. R3 661. It is likewise undisputed that no defense counsel ever sought discovery from the Attorney General's office. The Attorney General's fourteen indictments yielded convictions of two off-duty officers for misdemeanor assault and battery.[10] R3 662; R5 132-133. Those two were promptly added to the HCDAO Brady database, and the convictions will be disclosed in cases where the two officers are witnesses, even after the statutory period for impeachment. R3 244-245; R3 326-327.

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was one of several present when misconduct occurred was a violation of that officer's due process rights and subjected him to adverse employment consequences. See, e.g., *Fraternal Order of Police Lodge No. 5 by McNesby v. City of Philadelphia,* 267 A.3d 531 (2021); *Duchesne v. Hillsborough County* Att'y, 167 N.H. 774 (2015).

[10] This Court recently vacated a Superior Court order dismissing the indictments of one other officer and the bar owner. *Commonwealth v. Sullivan*, 492 Mass. 36 (2023).

The Special Master also heard evidence about other cases drawn from Petitioners' affidavits and case lists. R3 348-381. The Special Master recounted some of this evidence. R3 687-695. She did not find any misconduct by the HCDAO, nor did she find that the office misused its power to file a *nolle prosequi*. R3 709.

As the Special Master found, after extensive litigation, Petitioners have identified only five cases, spanning twenty years, in which a court has found that the HCDAO improperly failed to disclose exculpatory evidence. R3 698. Of the three appellate cases, one nondisclosure occurred in 2001, long predating current administration. The two Superior Court cases involved a grand jury presentation (*Commonwealth v. Fonseca-Colon*) and a complicated sexual assault prosecution (case unidentified) in which both the prosecutor and the defense attorney were chastised for their failure to realize that a Farak conviction that formed the basis for a habitual offender charge had been vacated. Id. None of these five cases involved misconduct by the Springfield Police Department or the credibility of police officers. R3 706-707. The sixth case cited by the Special Master, *Graham*, is somewhat unique involving as it did, both a mistaken assumption by counsel on both sides and a judicial finding not of misconduct by the HCDAO, but by defense counsel. R3 707. See discussion supra at 9.

B. The Record Shows that the HCDAO has Made Extraordinary Efforts to Obtain and Disclose Potentially Exculpatory Evidence Related to the Department of Justice Report, Despite Questions about Its Relevance or Reliability.

Although the DOJ informed the HCDAO that it was beginning an investigation into the SPD sometime around 2017, the district attorney was neither invited to participate in the investigation nor informed of its progress. In fact, the HCDAO learned of the DOJ report at the same time as the rest of the world: when it was publicly released in July 2020. R 3 167-168; R3 665. The HCDAO immediately set out to obtain further information about the incidents of misconduct the DOJ claimed to have discovered. To say that the HCDAO's efforts were met with federal resistance is a gross understatement. To say that the office's efforts went far beyond the legal requirements is not. R3 668-672.

Applying an expansive interpretation of its duty to "learn of" and disclose exculpatory evidence, *Commonwealth v. Cotto*, 471 Mass. 97, 112 (2015), the HCDAO had several communications with the DOJ, culminating in a formal public records request. Although the HCDAO fully expected a federal law enforcement agency that claimed to have identified a pattern and practice of police misconduct to cooperate in providing that information to affected defendants, the DOJ inexplicably refused. Instead, the DOJ stonewalled, resulting in litigation that is presently pending in the First Circuit. R3 670.

The HCDAO also had multiple communications with the SPD in an attempt to identify the officers involved in the incidents described by the DOJ—an effort that met with limited success, as the SPD had no idea which of the 114,000 documents the DOJ had reviewed formed the basis for the report. Nevertheless, the SPD assigned Deputy Chief Steven Kent[11] to review the report. As a result of his efforts, sixteen incidents, involving thirty-one SPD officers, were identified. On July 2, 2021, the SPD produced the list of officers, along with 712 pertinent documents, to the HCDAO.

To disseminate the material as widely as possible, the HCDAO delivered the entire package of documents to both Petitioners, while simultaneously beginning the massive project of identifying potentially affected defendants—eventually numbering more than 8000—and providing their counsel with the documents. R3 672-674. Petitioners will apparently never be satisfied: they have criticized every

[11] In the true spirit of "no good deed goes unpunished," Petitioners criticize the efforts of Kent, who they claim is one of the culprits. R1 254-261. This accusation ignores the fact that Kent successfully identified most of the officers, and was instrumental in enabling the HCDAO to make disclosures. R3 672. Notably, Petitioners have also accused the District Attorney of "complicity" in the wrongdoing, and suggested that the HCDAO should not investigate misconduct in which it was involved, See ACLU, Public Defenders, and Defense Lawyers Call for Investigation into Years of Springfield Police Misconduct, Hampden DA Complicity | American Civil Liberties Union, April 6, 2021, last accessed May 31, 2023; R1 058 (HCDAO should identify "an impartial entity" to conduct an investigation)—a claim that cannot be squared with the basic premise of the petition, which calls upon the HCDAO to conduct just such an investigation.

aspect of the HCDAO's efforts, from the length of time necessary to make the disclosures (Petitioners' Brief at 11),[12] to a complaint that their lawyers received too many disclosures (R2 182; R2 509); to the fact that the disclosures were made to counsel rather than to individual defendants (R4 421-423); the allegedly incomplete nature of the disclosures (Petitioners' Brief at 43-44); and the fact that the cover letter does explain to defense counsel the way in which the materials are exculpatory (R1 343; R2 509). See R3 675; Petitioners' Brief at 47-49. Lost in their rhetoric is the fact that Petitioners offered no evidence that any defendant or counsel has ever attempted to use the DOJ information—or even to obtain additional or clarifying information. R3 383; R3 678. No one has even requested unredacted copies of the documents. R3 177.

To borrow from the second sentence of Petitioners' opening brief, once the documents underlying the DOJ report were widely distributed among the defense bar, a strange thing happened: nothing. See Petitioners' Brief at 10. The HCDAO cites the complete absence of evidence of any response not to denigrate or minimize the importance of its constitutional obligation to disclose exculpatory evidence. Rather the significance of the lack of defense reaction is two-fold: first, to

[12] Petitioners apparently seek credit for forcing these disclosures, pointing out that the HCDAO disclosures began only after their Petition was filed. Petitioners' Brief at 25-28. The Special Master's findings clearly detail the HCDAO's efforts to obtain these documents, which began on July 20, 2020, ten months before this Petition was filed. R3 665-673; R5 111-112. *Post hoc, non ergo propter hoc.*

demonstrate that, contrary to Petitioners' assertion, there is no crisis of justice in Hampden County, and second, that the alleged nondisclosure has had no actual effect on defendants' rights, as even after disclosure, defense counsel have uniformly ignored the existence of this supposedly devasting information. Indeed, the reaction of two defense counsel who testified is instructive.

Attorney Thomas O'Connor, who has handled at least 2000 cases on behalf of criminal defendants (R2 188), cited precisely one case, which was among those described in the DOJ report, in support of his claim that the "HCDAO regularly failed to automatically disclose exculpatory evidence relative to my clients." R2 19, R5 326-327. He then filed a supplemental affidavit (R5 328-329), acknowledging that, in fact, he had received a disclosure relating to the case he had originally cited. However, he said of that information, "I didn't ask for it, didn't need it, didn't want it, yeah. If I had asked for it and needed it and wanted it, then that would be a different story, but I got things that are not useful to me." R2 202.

Attorney John Greenwood, who represented the brother of O'Connor's client, who was a co-defendant in the same case, testified that he had "disk after disk after disk of grand jury minutes" provided to him by the HCDAO that he has never read. R3 018-020. He admitted receiving one of the cover letters sent by the HCDAO—but had no memory of the enclosed documents. R3 023-025; R3 029-

030. In fact, he claimed that he received the documents from co-defense counsel O'Connor—who denied ever having them. R3 027-028; R5 328.

These two lawyers said out loud what the remainder of the defense bar apparently thought: that it is not worth their time to pursue additional information, and that the information they are given is so irrelevant that they do not bother to use it, or even to read it. While the members of the Hampden County defense bar are content, and even eager, to have the HCDAO expend time and resources pursuing and disseminating this information, they are far too cognizant of the lack of benefit to their clients to do it themselves.

Petitioners' call for a further investigation is based on their speculation that the incidents in the DOJ report are simply the tip of some massive iceberg, careening toward Hampden County defendants and threatening to deprive them of their constitutional rights. Instead, there is good reason to suspect that the report contains not gold, but fool's gold. Even a cursory comparison of the DOJ descriptions with the actual SPD documents demonstrates that the DOJ's inferences and conclusions are at best, debatable, and at worst, wrong. One case on Petitioners' list highlights the issue:

DOJ No. 5 (Bruno-Villanueva)

5. "In another incident, a Narcotics Bureau officer punched T.S., a 17-year-old youth, as he rode a motorbike past a group of Narcotics Bureau officers. At the time of the punch, the officers were making unrelated arrests; when the youth rode his motorbike past the officers, reportedly at a high rate of speed, an officer struck the youth. In the involved officer's arrest report, he does not characterize the strike as a punch, but rather states that he "extended his left arm" to prevent the youth from colliding with him on the motorbike. The 17-year-old then "swerved" his motorbike and the officer ended up "mak[ing] contact" with the youth's head and shoulder area. Administering a fist strike in this circumstance was particularly dangerous as the youth could have easily lost control of the motorbike, severely injuring himself, the officer, or others. The subject's brother, L.S., was also punched in the face, but by a different Narcotics Bureau officer. The officer who punched L.S. reported that he did so because L.S. ran towards the officer "with his fist clenched and arm cocked back." None of the other officers at the scene corroborated the punching officer's account." (DOJ p.12).

See Exhibit 5 in Appendix.

In order to avoid being injured by Mr. [redacted] or injuring Mr. [redacted] by his reckless driving I extended my left arm out to protect my body from taking on a collision which seemed to be inevitable. By doing so Mr. [redacted] swerved from striking me with his

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Approved: 07/28/2019 @ 0703 Approval ID: H544

motorized bicycle and I made contact with his shoulder/head area. At this time Mr. [redacted] continued to ride away from officers and I then proceeded to walk towards my cruiser. As I continued to walk I heard Mr. [redacted] shout out "fuck you cops" "you aint shit", as he made his way to where I was standing in the street. I turned around and proceeded to walk back to Mr. [redacted] as he continued to approach me while shouting more profanities.

R4 186; R4 199-200. The DOJ report describes an officer who "punched" a juvenile on a motorbike, and a few sentences later characterizes this as a "fist strike"—while acknowledging that there was no such description. What the officer had written was that he thrust out his arm to avoid the juvenile, who was headed toward him at a high rate of speed, and that the juvenile swerved and the officer made contact with his head and shoulder. There is no factual basis for the DOJ's characterization of a punch or first strike; it is *at best* a matter of interpretation. It is only when the DOJ's interpretation—which ignores the officer's fear for his own

safety—is accepted, that the report becomes even arguably exculpatory in other cases where that officer might testify.[13]

First Assistant District Attorney Jennifer Fitzgerald, who has spearheaded the disclosure efforts, was asked by Petitioners' counsel whether she thought that the DOJ report was accurate. In an answer that now seems prescient, she replied that she believed that, if the DOJ report were accurate, "they would provide us with the backup information. And they won't. I don't think they have the supporting information with which to prove their conclusion. But that's just my opinion." R3 562.

Since the Special Master's report was issued, the Kent Report has been disclosed, and at the HCDAO's request, has been made part of the record in this case. R4 140-168. As the Kent Report—whose length equals that of the entire DOJ report—reveals, the DOJ's "findings" are far from indisputable; in fact, the Kent Report rivals the Special Master's report in the damage it does to Petitioners' allegations. The report details countless factual and cognitive errors in the DOJ's work—from clear factual errors (R4 152, 157), to misidentifying and miscounting officers at the various scenes (R4 151-152), to failing to acknowledge the physical jeopardy to the officers in certain situations (R4 151, 153), to omitting the crucial fact that

[13] Despite these and similar discrepancies, Petitioners continue to rely on the DOJ's interpretation as if it were established fact. See, e.g., Petitioners' Brief at 22-23.

many of the defendants were actually convicted by a jury or pleaded guilty to attacks on a police officer (R4 151, 155-156). The HCDAO will not recite Kent's careful analysis of each case here; the report speaks for itself in its attention to detail, and demonstrates the precise type of investigation Petitioners seek. They may not like the messenger; apparently, they like his message even less.

Whatever doubts the HCDAO may have harbored about the accuracy of the DOJ report[14], the record demonstrates that it has handled the information in the manner directed by this Court, to "err on the side of caution." *Matter of a Grand Jury Investigation*, 485 Mass. at 650. Hampden County defendants have received everything to which they are constitutionally entitled—and perhaps more.

II. Petitioners' Call for an Investigation of the Springfield Police Department is Unnecessary to Fulfill Constitutional Obligations, Unlimited in Time and Scope, and Beyond the Authority of this Court to Order.

A. The District Attorney's "Duty to Investigate" is Limited to What is Necessary to Identify and Disclose Exculpatory Evidence.

A district attorney's "duty to investigate" is the cornerstone of Petitioners' quest for relief. Yet virtually every time they discuss this duty, Petitioners misstate the prosecution's obligation as set forth by this Court in *Commonwealth v. Ware*, 471 Mass. 85 (2015). The Commonwealth's duty is "to learn of and disclose to a

[14] It is at least curious that, as far as anyone knows, none of the alleged victims of incidents described by the DOJ have come forward claiming excessive force.

defendant any exculpatory evidence that is 'held by agents of the prosecution team.'" 471 Mass. at 95, citing *Commonwealth v. Beal*, 429 Mass. 530, 532 (1999). The "duty to investigate" is not unlimited in scope, but rather "premised on the duty" described in *Ware* to identify and disclose exculpatory evidence to particular defendants. *Commonwealth v. Cotto*, 471 Mass. 97, 112 (2015).

There is no indication that there has been any change in the standard established in *Ware* and *Cotto* that a prosecutor's "investigation" is intended to identify existing exculpatory material to be disclosed, not to "gather evidence" that might be helpful to the defense. In a recent murder case involving a Federal Bureau of Investigation report containing information from a potential witness who claimed to have participated in the killing, this Court rejected the defendant's claim that the Commonwealth had an obligation to investigate the possibility that the defendant was not alone at the time of the crime. The Court held:

> The Commonwealth had no obligation to investigate the FBI report. "While the prosecution remains obligated to disclose all exculpatory evidence in its possession, *it is under no duty to gather evidence" or to conduct further investigation "that may be potentially helpful to the defense." Commonwealth v. Wright*, 479 Mass. 124, 140, 92 N.E.3d 1175 (2018), quoting *Commonwealth v. Lapage*, 435 Mass. 480, 488, 759 N.E.2d 300 (2001).

Commonwealth v. Moffat, 486 Mass. 193, 199 (2020) [emphasis added]. If the Commonwealth is not obligated to gather evidence directly related to a charged crime, *a fortiori*, it should not be required to gather evidence that would be at most

admissible for impeachment. As it did with the FBI report in *Moffat*—incidentally, also a Hampden County case—the HCDAO has provided the DOJ report to both of the organizations named as petitioners in this action (C.R.A. 00224, 00250), thereby enabling them to take whatever steps they deem appropriate to protect their clients' rights. So far, those steps have left no trace in the record.

Massachusetts district attorneys' offices are not designed or equipped to conduct wide-ranging factual investigations. Rather, their function is to review the results of investigations by police departments and other investigative agencies, to make charging decisions, and to prosecute crimes. Once charges are filed, the district attorney has a constitutional obligation created by *Brady v. Maryland*, 373 U.S. 83 (1963), which is specific and personal to the individual defendant in each case. The district attorney has no obligation to "investigate" crimes or other acts of wrongdoing, nor does he owe a duty of "investigation" either to an identified class of prospective defendants or to the general public.

In that sense, the phrase "duty to investigate" is misleading. As the Special Master noted, the district attorney "lacks the capacity to do so while performing its statutory functions." R3 706. Petitioners cite no authority that would compel an executive branch office to cast aside its crucial responsibility to prosecute crime in order to assume an investigatory role. Rather, the district attorney's duty is more

accurately described as a duty to review existing sources of information in the context of each pending case to determine whether there is exculpatory information that must be disclosed.

B. The Investigation Demanded by Petitioners Far Exceeds the Scope of a Prosecutor's *Brady* Obligation.

Petitioners contemplate an investigation of unprecedented magnitude, both duplicating and exceeding the two-and-a-half-year efforts of the DOJ. They suggest that the HCDAO:

> should at a minimum, review all reports written or modified since 2013 in which it was alleged that force was used by an SPD employee, review all judicial findings questioning the credibility of SPD officers, and review all cases where the HCDAO filed a *nolle prosequi* after learning of possible SPD misconduct. . . . The Commonwealth should be required to provide periodic public reports of its findings, which would allow for the scope of the investigation to be tailored to emerging recommendations from the single justice, and to create a list of cases affected by any misconduct in order to ensure that impacted defendants will be notified."

R 1 052; R 3 644. Since filing the petition, they have expanded their proposed investigation to include a review of "every case [since 2013] where a defendant was charged with resisting arrest, disorderly conduct, or assault and battery on a police officer." Petitioners Brief at 35.

Passing the practical questions of how a county district attorney's office could conduct an investigation more sweeping or informative than the two-and-a-half year effort by the DOJ—which was backed by the full resources of the United

States government, and the constitutional bar that prohibits the judicial branch from managing the operations of the HCDAO, the time period on which Petitioners focus warrants comment. This Court has suggested that the time limits on the admissibility of convictions set forth in Rule 609, Mass. G. Evid., should inform the decision of a trial judge who contemplates exercising discretion to admit evidence of a witness's uncharged misconduct. *Matter of a Grand Jury Investigation*, 485 Mass. at 652. The investigation proposed by Petitioners would focus on police actions which, if offered as evidence today, occurred as long as ten years ago. By the time Petitioners' mythical investigation could be completed, those events would be but a distant historical footnote.

Likewise, Petitioners' call for the HCDAO to comb through years of judicial opinions—with no time or geographic limitation—is absurd on its face.[15] There is no reason to suggest that the HCDAO is in a better position to locate such opinions than Petitioners and other defense counsel—who after a presumably exhaustive search in connection with this case, have identified three opinions (two of them oral and unreported) in a span of fifteen years.

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[15] As noted *infra* at 39, an obligation to disclose judicial opinions has never been established either by procedural rule or judicial decision. If and when such an obligation is created, it will raise numerous questions about time and language that require careful thought and attention. See discussion in Respondent's Reply to Petition for Relief, R1 190-191, at footnote 17.

C. The Separation of Powers Doctrine Precludes this Court from Ordering the District Attorney to Investigate the Springfield Police Department

Even if they had succeeded in establishing the systemic violations they allege, Petitioners would be forced to confront the unfortunate truth that this Court is constitutionally prohibited from ordering the sweeping investigation Petitioners seek.[16] The superintendence powers conferred by statute, see G.L. c. 211 § 3, permit this Court to exercise its powers over all lower courts, but do not extend to the supervision or administration of the executive branch. See, *Doe v. Sex Offender Registry Bd.*, 480 Mass. 212, 221 n.3 (2018) (superintendence authority of Supreme Judicial Court only empowers Court to exercise superintendence over courts of inferior jurisdiction, not executive agencies). In addition to prescribing the manner of investigation that the HCDAO should be ordered to conduct, petitioners suggest that the office should be required to create a "list of cases affected by any misconduct," (Petition at 26) and that it should be responsible for SPD files not in its

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[16] Petitioners' prayer for relief in the Corrected Petition raises additional questions about the ability of this Court to grant relief—or the HCDAO's ability to comply with Petitioners' demands. The Petition asks the Court to "require the Commonwealth to notify the Court whether it intends to undertake such an investigation and, if so, whether it has identified an impartial entity to do so." R1 058. As Petitioners have chosen to bring their Petition solely against the HCDAO, and elsewhere, have argued that the HCDAO should be conducting some investigation, it is unclear what "impartial entity" Petitioners believe should be conducting the investigation, and by what authority the HCDAO or this Court could compel that entity to act.

possession or control (Petition at 29). This Court has expressly recognized that it does not have the power to require any district attorney to promulgate specific Brady policies. *Matter of a Grand Jury Investigation*, 485 Mass. at 658. Nevertheless, that—among many other things—is precisely what the Petitioners are asking this Court to do.

Mindful of the insurmountable hurdle presented by the separation of powers, Petitioners seek to steal yet another page from *Cotto*, and ask this Court to require the HCDAO to declare whether it intends to investigate the SPD. Petitioners' Brief at 30. It is difficult to imagine a more pointless exercise. Lest Petitioners harbor some misunderstanding of the HCDAO's intentions—despite its consistent stance over the past three years since the DOJ report was released, the specific testimony from First Assistant Fitzgerald, R3 381-383, and the findings of the Special Master, R3 706—the HCDAO has determined that any factual investigation would be an irresponsible use of its limited and specialized resources, and would detract from its mission to prosecute criminals in Hampden County.

The DOJ has already conducted an extensive investigation spanning more than two years, 114,000 documents, and more than a hundred witnesses and other stakeholders. Based on the DOJ findings, the United States Attorney indicted precisely zero defendants. R3 566. The HCDAO's 8000 disclosures relating to inci-

dents identified by the DOJ have affected the result of precisely zero past or pending cases. The question of allocation resources aside, there is nothing to suggest that additional investigation would adduce exculpatory evidence the DOJ did not find. The Massachusetts Attorney General's Office, which prosecuted the Nathan Bill's defendants, and which—according to Petitioners, is aware of this case—has likewise seen no need for further investigation. (R 3 644). To answer Petitioners' question, the HCDAO *will not* be "investigating" the SPD—at least in the manner advocated by Petitioners. The HCDAO *will* continue its pattern and practice of satisfying its *Brady* obligations.

III. Petitioners Have Cited No Authority for Their Unprecedented Attempt to Obtain Global Remedies for a Virtually Unlimited Class of Defendants.

A. Petitioners' Suggested Global Remedies Are an Attempt to Evade the Separation of Powers Doctrine by Placing Burdensome, Intolerable, and Impermissible Restrictions on the HCDAO's Ability to Prosecute Crime.

Correctly realizing both that the Court has no power to order the HCDAO (or any other executive branch agency, especially those who are not before this Court) to investigate of the SPD, and that neither the HCDAO nor any other Commonwealth agency believes such an investigation is warranted, Petitioners have developed a "creative" plan to coerce the HCDAO to do their bidding. Petitioners propose a laundry list of burdensome evidentiary and procedural restrictions that would eviscerate the HCDAO's ability to prosecute defendants arrested by the

SPD. Left unstated is Petitioners' apparent hope that the onerous nature of these "remedies" will force the HCDAO to view an investigation as the lesser evil.

Even when facing the admitted egregious misconduct of the chemist, Sonja Farak, this Court repeatedly emphasized its reluctance to impose global remedies. See, e.g., *Bridgeman v. District Attorney for the Suffolk Dist*., 476 Mass. 298 (2017) (Bridgeman II); *Bridgeman v. District Attorney for the Suffolk Dist*., 471 Mass. 465 (2015) (Bridgeman I); see *Commonwealth v. Cotto*, 471 Mass. 97, 110 (2015), citing *Commonwealth v. Scott*, 467 Mass. 336, 352 (2014) ("no reasonable certainty" that there was a "lapse of systemic magnitude in the criminal justice system that "belied[d] reconstruction"). Indeed, the global remedies ultimately imposed in the drug lab cases came only after multiple, increasingly broad, efforts had failed. And the global remedy eventually created was appropriately tailored to combat the specific misconduct that had tainted the convictions. *Committee for Public Counsel Services v. Attorney General*, 480 Mass. at 726.

In the aftermath of *Cotto*, this Court has continued to emphasize the "*sui generis*" nature of the drug lab cases. *Commonwealth v. Hallinan,* 491 Mass. 730, 747 (2023). Even in the face of a presumption of misconduct, this Court continues to require some connection between the misconduct and the defendant's conviction. See e.g., *Hallinan*, id., *quoting Commonwealth v. Scott*, 467 Mass at 351 (defendant must show "nexus between government misconduct and the defendant's

own case”); see also *Commonwealth v. Ruffin*, 475 Mass. 1003, 1004 (2015) (plea on drug charge not vacated where chemist’s misconduct occurred after the plea). As the Special Master found, the present case does not remotely resemble the egregious drug lab misconduct that eventually led this Court to impose global remedies. R3 712-713.

The Special Master noted that the claim in this case is that the HCDAO must “investigat[e] disputed allegations and/or evaluate[e] their truth.” R3 714. While district attorneys regularly make such assessments of credibility in connection with charging decisions in individual cases, Petitioners’ request is not so limited. Rather, they seek an investigation of the operations of an entire urban police department, without limitations of time, personnel, or incidents charged as crimes. No Court in the Commonwealth has ever imposed such a duty.

Yet Petitioners’ demands exceed even the wide-ranging investigation as framed by the Special Master. Petitioners view the duty to disclose as encompassing far more than adjudicated misconduct. Among the “evidence” they claim should have been disclosed are pending civil charges (R6 117 ¶8), criminal indictments (R6 078), investigations that reach a conclusion that criminal charges cannot be supported (Petitioners’ Brief at 40-41; R6 078), physical encounters between police and arrestees where the arrestee makes no claim of excessive force (Peti-

tioners' Brief at 35; R3), unintentional loss of evidence resulting in a *nolle prosequi* (R2 169), and unprofessional conduct that does not involve falsification of reports or physical conduct (R3 519). In essence, they seek to make both the required investigation and the resulting disclosures virtually limitless: any accusation that might result in a finding of misconduct, regardless of whether such a finding actually ensures or even whether the accusation is known to the police or the HCDAO, must, in their opinion, be disclosed as exculpatory evidence.

B. The Remedies Sought by Petitioners are Extraordinary Even by *Cotto* Standards

Even where the prosecution is found to have failed to disclose exculpatory evidence, courts do not blindly impose a uniform sanction. *Commonwealth v. Carney*, 458 Mass. 418, 427-429 (2010). Rather, the judge considers a variety of factors, including the prejudice to the defendant, the strength of the other evidence, and the degree of fault associated with the nondisclosure. *Commonwealth v. Pope*, 489 Mass. 790, 801 (2022); *Commonwealth v. Lowery*, 487 Mass. 851, 769 (2021); *Commonwealth v. Frith*, 458 Mass. 434, 441 (2010). Even in the drug lab cases, where this Court implemented a system of presumptions, those presumptions were narrowly tailored to redress Farak's specific misconduct in falsifying drug certificates, and insisted that reliance on the validity of the certificate be at least temporally conceivable.

The Petition contains a list of "interim remedies" Petitioner seek from this Court. R1 052-053; R3 644. Impermissible, impractical, or unnecessary on their face, these include:

- creation and monitoring of a thorough Brady list of officers with misconduct issues [a process already in effect, as described by First Assistant District Attorney Jennifer Fitzgerald, R3 210-211; R3 680];

- ensuring that defendants receive evidence as it becomes available [a process already covered by Rule 14, Mass. R. Crim P.];

- a judicial presumption in favor of the admissibility of the DOJ Report [a clear violation of Mass G. Evid., Section 803(8), as well as inconsistent with the plain language of the report that states in footnote 2: "[t]he Department of Justice does not serve as a tribunal authorized to make factual findings and legal conclusions binding on, or admissible in, any court, and nothing in this Report should be construed as such. Accordingly, this Report is not intended to be admissible evidence and does not create any legal rights or obligations." R4 006];

- appropriate jury instructions, in cases where SPD Narcotics Bureau officers are members of the prosecution team [unclear what instruction Petitioners contemplate];

- limitations on the admission of police reports at G. L. c. 276, § 58A and probation violation hearings [already established by *Commonwealth v. Vega*, 490 Mass. 226 (2022) and *Commonwealth v. Durling*, 407 Mass. 108 (1990); see Mass. G. Evid., Section 1101(c)(3)];

- limitations on SPD officers refreshing their recollections with police reports [already covered in Mass. G. Evid., Section 612].

In addition to these remedies proposed in their initial Petition, Petitioners have now expanded their sights, seeking dismissal of every case in which excessive force is found and vacating convictions where a "discredited" officer's testimony was the basis of a conviction. Petitioners' Brief at 36.

Petitioners would have these proposed "remedies" imposed without the need for established or admitted misconduct, and without regard to any of the factors generally applicable in nondisclosure cases. Completely lost are the twin principles that the sanction should be tailored to the Commonwealth's culpability, and that the nondisclosure must be plausibly connected to some harm to an individual defendant.

Petitioners' proposed remedies are further imbued with their world view of what they *wish* were required, a perspective that bears little relation to existing law. Petitioners suggest a presumption in favor of admissibility of the DOJ report, a direct violation of Mass. G. Evid., Section 803(8). They conveniently overlook the fact that the most recent incident in the report is already more than five years old. And the prohibitions in Sections 608 and 404, Mass. G. Evid. are completely ignored.

Indeed, even some of Petitioners' proposed "remedies" violate basic separation of powers principles. Petitioners propose that this Court should "ensur[e] that

defendants receive evidence as it becomes available." R1 052. It is unclear how Petitioners expect this Court to micromanage the day-to-day operations of the HCDAO—or by what authority they suggest it could do so.

Given that the alleged (but unproved) nondisclosures consist of impeachment evidence of dubious admissibility, Petitioners' proposed "remedies" are completely unwarranted. In fact, any sentient defense counsel would far prefer the "remedy" than the disclosure, as the remedy would provide a set of "facts" that are neither provable nor admissible. These "remedies" would put defendants in a far better position than they would be if they had actual evidence of police misconduct.

C. The Record Establishes that the Ordinary Judicial Process is Functioning Properly and that there is No Need for the Extraordinary Remedies of *Cotto*—or the Super-Extraordinary Remedies Proposed by Petitioners.

This Petition seeks relief under the general superintendence authority of this court, conferred by G. L. c. 211 § 3, which permits relief when a party demonstrates "both a substantial claim of a violation of his substantive rights and irremediable error, such that he cannot be placed in status quo in the regular course of appeal." *Schipani v. Commonwealth*, 382 Mass. 685, 686 (1980) (quoting *Morrissette v. Commonwealth*, 380 Mass. 197, 198 (1980) [emphasis added]). "'[T]he rights of criminal defendants are generally fully protected through the regular appellate process.'" *Morrissette*, 380 Mass. at 198.

Nothing in *Brady* and its progeny impairs the principle that our criminal justice is dispensed in an adversary system. Defendants are entitled to counsel, who have the obligation to investigate and discover evidence favorable to their clients. See *Matter of a Grand Jury Investigation*, 485 Mass. at 653 (disclosing exculpatory information "may cause defense counsel, or his or her investigator, to probe more deeply). The tacit assumption in the Petition, and the attitude of some defense counsel, is that the HCDAO must accede to their demands without question (Petitioners' Brief at 44; R2 091, R3 126-127, R2 241), must file Rule 17 motions to obtain documents from third parties (Petitioners' Brief at 53), and must shoulder responsibility for the delays and errors of judges and court clerks (R2 247-252).

In assessing the need for extraordinary relief, it is instructive to consider what Petitioners and other defense counsel are actually saying and doing, not in this proceeding, but back in Hampden County, when representing actual clients. First, as noted *supra*, they are making no use of the information they claim to be so exculpatory. But perhaps more important, there is abundant evidence that cases involving discovery issues are being litigated and ruled upon on a regular basis. R3 214-215; R3 564-565; R3 701-703; R7 6-192. See *Commonwealth v. McFarlane,* 492 Mass. 1101 (2023). Petitioners have offered no evidence that the "regular appellate process"—or, for that matter, the authority of trial judges in the district and

superior courts—cannot adequately resolve questions involving a defendant's entitlement to exculpatory evidence. That the Petitioners may not agree with some positions taken by the HCDAO, or with the rulings they receive, does not entitle them to extraordinary relief.

At the initial hearing on this Petition, the Single Justice originally and appropriately expressed concern that defendants might be harmed by the absence of some exculpatory information. R1 181, 198. The ensuing two years have shown that concern to be unfounded. The HCDAO has made some 8000 individual disclosures (in addition to the disclosures to the two Petitioner organizations), and continues its effort to extract details from the DOJ. Petitioners and defense counsel, on the other hand, have done nothing to help themselves or their clients.

Recognizing the lack of extraordinary circumstances justifying the relief they seek, Petitioners' final attempt is a convoluted argument that attempts to salvage their original—and again, unproved—claim that the HCDAO has a practice of avoiding the disclosure of police misconduct by entering a *nolle prosequi*. See R1 43; R1 164; R6 008 ¶18. Petitioners submitted a list of cases where the HCDAO had *nol prossed* the case. R1 649-656.

Under pressure from the Special Master, Petitioners' counsel refused to abandon this claim completely—asserting instead that the HCDAO's use of the *nolle prosequi* justifies this Court's intervention, because once a case has been *nol*

prossed, no one has an interest in investigating the misconduct that allegedly drove the HCDAO's decision. See R3 338-348; R3 699. Because Petitioners refused to abandon this claim, the HCDAO offered evidence about each case on the list, R3 – including *Commonwealth v. Perez*, which was *nol prossed* because the victim was afraid of the defendant (R5 387-389), and *Commonwealth v. Finegan*, where the HCDAO filed a notice of *nolle prosequi* because the defendant had died! R5 436. Once again, the Special Master rejected Petitioners' factual predicate, finding that "the record does not show that the DAO has ever done so [filed a notice of *nolle prosequi*] to avoid disclosing police misconduct, or that the DAO's practice in this regard is in any way unusual or improper." R3 709.

D. This Lawsuit is Not the Proper Vehicle for Petitioners' Attempt to Expand the Scope of the Commonwealth's Disclosure Obligations

Two particular aspects of Petitioners' proposed remedies warrant special mention. First, Petitioners insist, without authority, that the Commonwealth is required to disclose a judicial finding that a police officer has lied in all future cases where it intends to call that officer as a witness. Petitioners' Brief at 45. The Special Master weighed in on this issue, offering her opinion that some form of disclosure is appropriate, but noting that the recent revisions to Mass. R. Crim. P. Rule 14 would impose no such requirement. R3 707-708.

Matter of a Grand Jury Investigation already directs prosecutors to disclose evidence that an officer has been untruthful. The difference between that formulation and the rule proposed by Petitioners is how the determination of untruthfulness is made. *Matter of a Grand Jury Investigation* assigns that responsibility to the Commonwealth, holding that disclosures should be made "where *a prosecutor determines* from information in his or her possession that a police officer lied…." 485 Mass. at 658 [emphasis added]. There is logic in this position; as HCDAO First Assistant Fitzgerald explained, such findings are often made in preliminary hearings, where the judge does not have a full factual record or where the officer's credibility may not be essential to the issue to be decided.[17]

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[17] In *Commonwealth v. Santiago*, R5 368-385, the officer's disputed testimony involved his understanding of the SPD tow policy. The Commonwealth did not come to this hearing, which involved a motion to suppress, prepared to litigate the content of that policy. Fitzgerald reviewed the decision in a meeting with the HCDAO appellate chief Kate MacMahon, and Assistant District Attorney Ingrid Frau, who conducted the hearing before Judge Sweeney and explained why she did not believe the officer had lied. Based on that discussion, the HCDAO determined that the officer had misunderstood the tow policy, and had not deliberately lied. R3 350; R3 499-502; R3 682-683.

In *Commonwealth v. Perez*, R5 390-422, the issue arose at a dangerousness hearing the week following the incident during which the arresting officers discharged their firearms. The trial judge did not determine that the officers had lied; rather, after making the finding of dangerousness, he went on to "offer something unsolicited that has weighed upon my mind." R.5 408. He stated "at this stage, without any additional evidence for consideration, the Court is going to find that there is a substantial incongruity between the officers' version of how the defendant was shot and the location of the defendant's gunshot wounds on his body." He suggested that this shooting should "receive a most thorough and impartial scrutiny

The HCDAO takes no position on the ultimate resolution of this question; rather the District Attorney notes that this is a complicated and nuanced issue. Trial judges frequently make credibility findings, in varied language, with varied bases, in various circumstances or procedural postures within a case—including in relation to whether a burden of proof has been met. See discussion at R1 090; R3 707. The formulation of a rule that identifies only those instances meeting the standard in *Matter of Grand Jury* requires careful thought and precise language.[18] In many cases, the officers involved will not agree that they have been untruthful, and perhaps should fairly be afforded an opportunity to explain or rebut the judicial

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specifically by the Commonwealth." R5 410. The officer had already been placed on administrative leave, R2 154-155, and the case was subsequently investigated in accordance with the standard policy for an officer-involved shooting. Based on that investigation, the HCDAO determined that there was no evidence that the officers had improperly discharged their weapons. R3 328-330. The HCDAO did not believe that the officers had lied, and did not add them to its Brady database. R3 330; R3 685-686.

[18] It is not clear whether this hypothetical standard would apply to any of the decisions cited by Petitioners other than the 2007 case of *Commonwealth v. Reyes* (R5 423-435)—which has not been disclosed by any of the four district attorneys who have held office in the intervening fifteen years, nor by Attorney David Hoose, the former president of Petitioner HCLJ, who represented Reyes. R3 686. For example, Judge Groce found a "substantial incongruity," between the testimony and the physical evidence, which does not equate to a finding that an officer has deliberately lied. Judge Callan did not credit a state trooper's testimony that the license plate of a moving car was illegible, thereby allowing a motion to suppress. R3 683; R5 410. Perhaps Judge Sweeney's finding that the officer was "making it up" (R3 682; R5 365, 372-373) would suffice; the point is that the precise language of the judicial opinion in question and the new rule urged by Petitioners matters a great deal.

finding before being branded a liar. See fn. 14, *supra*; *Milligan v. Board of Registration in Pharmacy*, 348 Mass. 491, 496 (1965) ("Due process rights are implicated whenever the government impairs a person's 'opportunity to engage at all in a particular occupation, or a particular aspect of an occupation.'"). Finally, as noted elsewhere, there is a long and tortuous path from a judicial decision, which is not itself admissible, see, e.g., *United States v. Wright*, 534 F. Supp. 3d 384 (M.D. Pa. 2021), to the development of admissible evidence, to the successful argument that such evidence is admissible under current Massachusetts evidence law.

Because of the complexities involved, this issue should be decided in the ordinary course, on a specific set of facts, with the opportunity for input from all affected stakeholders,[19] rather than on the theoretical basis advocated by Petitioners. Petitioners have failed to make any showing that immediate resolution is necessary to avoid injustice; indeed, the record is undisputed that, in the three instances of judicial findings they cite, no defense counsel—including counsel involved in the original case—has either attempted to use the judicial opinion or to inform other defense counsel of its existence. R3 686-687.

Petitioners also raise for the first time in their brief an argument that this Court should overrule existing case law as set forth in *Commonwealth v. Wanis*,

[19] It bears mention that the recommended amendments to Mass. R. Crim P., Rule 14, drafted by a committee composed of members from the prosecution, defense lawyers, and judges, did not include a requirement of such disclosure. R3 704.

426 Mass. 639 (1998) and *Commonwealth v. Rodriguez*, 426 Mass. 647 (1998) (Petitioners' Brief at 49). Petitioners are entirely within their rights to ask this Court to revisit prior rulings. But such a request should not be done in the proverbial dead of night. Petitioner Lopez's case raised this issue (among others), yet defense counsel never asked the trial judge to report the *Wanis* issue[20]--and in fact received extensive internal affairs documents. There is no factual finding in this case—either of a wrong to a specific defendant or a systemic injustice—to show that relief is necessary here. Rather, the record simply reflects that Petitioners find it inconvenient to comply with the procedure established by this Court twenty-five years ago, and would prefer to shift the burden to the District Attorney. See e.g., R2 244-252.

IV. Regardless of Questions About Standing, the Extensive Factual Record Created by the Special Master Makes this Case Appropriate for Resolution of the Issues Presented.

As noted by the Special Master, neither of the individual defendant petitioners, Chris Graham or Jorge Lopez, seek specific relief from this Court. R3 653, 655. The Special Master found that neither has an interest in the outcome of this

[20] In fact, it was the HCDAO that sought review in this Court of a trial court ruling that it should "make reasonable injury" about IIU material. The Single Justice denied relief, ruling that the fact that "an order is erroneous and that allowing it to stand would encourage similar discovery request s in the future" is "not an adequate reason to exercise the court's superintendence power." See SJ-2021-0122, Docket No.3, 5/4/2021. Petitioners' belated efforts to have the Court address the issue in the abstract should fare no better.

Petition. R3 710. Likewise, the two defense attorney petitioners have no personal interest in the outcome of this case, other than changes in the law that they view as favorable to their clients. Further, to the extent that Auer claimed that she had been forced to expend time because of the HCDAO's alleged discovery violations, the Special Master noted inconsistencies and inaccuracies in her testimony, and specifically found that her claims were not credible. R3 647, 694.

The two organizational petitioners, CPCS and HCLJ, stand on somewhat different footing, and the Special Master recommended that this Court recognize their standing. R3 710. While the HCDAO continues to believe that the organizations have not demonstrated sufficient standing, the district attorney recognizes that this Court and others have found that CPCS, in particular, has had standing where there are allegations of widespread misconduct. See e.g., *CPCS v. Attorney General*, 480 Mass. 700, 703 (2018). Given the abject failures of proof in this case, the HCDAO does not believe that organizations' standing has been established. Nevertheless, the district attorney also believes that, given the time and resources devoted to this case by the courts and the parties, it is in the public interest to decide the case. Petitioners have been given every opportunity to prove their claims; their failure to do so should be memorialized in a decision of this court.

CONCLUSION

Petitioners have failed to prove the underlying premise of their Petition, and have shown no basis on which this Court should exercise its extraordinary power under G.L. c.211 §3 and G.L. c.231A §1. The Petition should be dismissed.

The Respondent,
District Attorney for Hampden County,
By his Attorneys,

/s Elizabeth N. Mulvey

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 16(k), MASS. R. APP. P.**

I, Elizabeth N. Mulvey, hereby certify pursuant to Rule 16(k), Mass. R. App. P., that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to Rule 16(e), and Rule 20. This brief was prepared using Times New Roman, 14 point type, and contains 10,982 non-excluded words, as determined by the word count feature of Microsoft Office 365.

/s Elizabeth N. Mulvey

ELIZABETH N. MULVEY

CERTIFICATE SERVICE

I, Elizabeth N. Mulvey, hereby certify that I have this day served a copy of the Brief of Respondent-Appellee on counsel of record for the Petitioners, by electronic mail.

Signed under the Pains and Penalties of Perjury this 20th day of June, 2023.

/s Elizabeth N. Mulvey

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ELIZABETH N. MULVEY